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Environmental Statutes That Control U.S. Agency Projects Abroad: The Endangered Species Act and *Defenders of Wildlife v. Lujan*

[A]lthough the Endangered Species Act came into existence with no clearly articulated rationale, and although the need for one was initially avoided because of the generality of the act, day-to-day implementation in a complex political and bureaucratic milieu has progressively demanded decisions regarding its most important goals.*

INTRODUCTION

Over the last several years, 40 to 50 million acres of tropical forest, an area the size of Washington State, has been destroyed each year.¹ The timber from these forests is cut for its commercial value and existing vegetation is burned in order to clear land for agriculture and other development.² These clear-cutting and burning activities destroy the natural habitat of uncounted numbers of plant and animal species.³ Accelerated habitat depletion is driving indigenous species of plants and animals to extinction at an alarming rate.⁴ This loss of species is not confined to the

* B. NORTON, WHY PRESERVE NATURAL VARIETY? 5-6 (1987).

¹ Shabecoff, *Loss of Tropical Forests is Found Much Worse Than Was Thought*, N.Y. Times, June 8, 1991 at A1, col. 1 (citing figures prepared in collaboration with the United Nations by the World Resources Institute) [hereinafter Shabecoff]. See generally, WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-1991 (1991) [hereinafter WORLD RESOURCES INSTITUTE]. Satellite data covering the 1987 dry season in Brazil showed that the Amazon rain forest was being cleared far faster than previously thought. Eight million hectares, an area about the size of Austria, were burned there in 1987 alone with no signs of a decreased rate seen for the future. L. BROWN, STATE OF THE WORLD 4 (1989).

² See Shabecoff, *supra* note 1.

³ Tropical forests harbor at least 2.5 species of plants and animals, and perhaps many more. Schmidt, *Ecodevelopment: Using, Not Losing, the Rain Forest*, Chicago Tribune, May 13, 1991, at 15, zone C.

⁴ The abundance and complexity of ecosystems, species, and genetic types defy efforts to inventory and directly assess the scope of the problem. As a result, an accurate estimate of the rate of loss of species is impossible. Most scientists and conservationists

rain forests, but is occurring in most regions of the world.⁵

The rapid decline in biological diversity⁶ that accompanies habitat depletion is a matter of grave concern. While the development of land can provide considerable benefits when the land's capability to sustain growing communities is preserved, compelling evidence indicates that the rapid and unintended reduction in biological diversity is undermining society's capability to respond to future needs.⁷ For example, the loss of species decreases our ability to identify plants that may be used to develop disease-resistant crops, new textiles, necessary medicines and potential cures.⁸ As a result, the genetic storehouse of the

working in this area believe that the problem has reached crisis proportions. OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESSIONAL BOARD OF THE 100TH CONGRESS, TECHNOLOGIES TO MAINTAIN BIOLOGICAL DIVERSITY 3-4 (1987) [hereinafter TECHNOLOGY ASSESSMENT].

⁵ See, e.g., TECHNOLOGY ASSESSMENT, *supra* note 4, at 3. Clear-cutting and burning are not the only activities causing habitat depletion and the resulting loss in species. The construction of enormous hydro-electric dams, for example, inundate vast regions upstream of the dam and dry out equally vast areas downstream. The upstream flooding can extinguish entire species and the downstream decrease in water supply similarly makes it impossible for indigenous species of plants and animals in the geographic region to survive. See generally, L. BROWN, *supra* note 1, at 21-76.

⁶ The term biological diversity has been defined as follows:

Biological diversity refers to the variety and variability among living organisms and the ecological [systems] in which they occur. Diversity can be defined as the number of different items and their relative frequency. For biological diversity, these items are organized at many levels, ranging from complete ecosystems to the chemical structures that are the molecular basis of heredity. Thus, the term encompasses different ecosystems, species, genes, and their relative abundance.

TECHNOLOGY ASSESSMENT, *supra* note 4, at 3. For example, a landscape interspersed with croplands, grasslands, and woodlands is more biologically diverse than a landscape with most of the woodlands converted to croplands. Likewise a rangeland with 100 species of annual and perennial grasses and shrubs has more diversity than the same rangeland after heavy grazing has eliminated or greatly reduced the perennial grass species. *Id.*

⁷ TECHNOLOGY ASSESSMENT, *supra* note 4, at 3. See generally L. BROWN, *supra* note 1; WORLD RESOURCES INSTITUTE, *supra* note 1.

⁸ Loss of tropical rain forests and deserts, which harbor genetically diverse vegetation, are of particular concern. TECHNOLOGY ASSESSMENT, *supra* note 4, at 4. New methods of manipulating genetic material enable the isolation and extraction of a desired gene from one plant or organism and its insertion into another. Loss of diversity, therefore, may undermine societies' realization of this technology's potential. *Id.* See also Osava, *Agriculture: Genetic Erosion Threatens Food Production*, Inter Press Service, June 1, 1991. The technological opportunities regarding crops are or have been abundant. Today, for example, we largely rely on six species of grain for food. The rain forests of the world contain another sixty, at least. See 135 CONG. REC. H 7,150 (daily ed. Oct. 18, 1989) (statement of Rep. Porter). In particular, an ancient wild relative of corn found in Mexico could be worth billions of dollars to corn growers around the world because of its resistance to seven major diseases plaguing domesticated corn. TECHNOLOGY ASSESS-

planet as well as the aesthetic beauty of vast, pristine regions are diminished through the rapid reduction in biological diversity.

During the 1970s and 1980s, the international community awakened to the threat posed by the continued, unchecked decline in biological diversity.⁹ Through cooperative efforts, an emerging body of general international principles has been developed. Under these principles, the United States has a duty, along with other states, to protect biological diversity worldwide.¹⁰

While preliminary steps were being taken in the international community, the United States took a vanguard position at home and, in 1973, Congress responded to the worldwide decline in biological diversity by enacting the Endangered Species Act (ESA).¹¹ The United States Supreme Court hailed the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."¹²

The ESA imposes special duties on United States federal agencies to ensure that agency activities will not contribute to the further depletion of endangered species. The authority for this check on agency activity is found in section 7 of the ESA.¹³ Section 7 imposes a duty upon all federal agencies to "[i]nsure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . ."¹⁴ Because of

MENT, *supra* note 4, at 5.

Regarding medicines, loss of plant species could mean the loss of billions of dollars in potential plant-derived pharmaceutical products. About 25 percent of the number of prescription drugs in the United States are derived from plants. TECHNOLOGY ASSESSMENT, *supra* note 4, at 4. Consequences to humans of loss of potential medicines have impacts that go beyond economic benefits. For example, alkaloids from the rosy periwinkle flower, found in Madagascar, are currently used in the successful treatment of several forms of cancer, including Hodgkin's disease and childhood leukemia. *Id.*

⁹ See *infra* notes 147-148 and accompanying text.

¹⁰ *Id.*

¹¹ Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 (1988)). The underlying purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth. . . ." *Id.* at § 1531(b).

¹² Tennessee Valley Authority, Inc. v. Hill, 437 U.S. 153, 180 (1978).

¹³ 16 U.S.C. § 1536 (1988).

¹⁴ *Id.* at § 1536(a)(2).

the general nature of the language in this provision, the issue of whether section 7 reaches federal agency actions carried out in foreign countries has been the subject of controversy since 1976, when preliminary regulatory guidelines were promulgated.¹⁵ From 1976 to 1986, ESA regulations, promulgated by the Department of Interior, interpreted section 7 as applying to United States projects carried out in foreign countries.¹⁶ For example, the Army Corps of Engineers would be under a duty to comply with section 7 before it constructed a dam overseas or undertook a large-scale agricultural project involving deforestation in sub-tropical regions.

In October of 1986, the Secretary of the Department of Interior (Secretary) promulgated new regulations eliminating the application of section 7 to federal agency actions carried out in foreign countries.¹⁷ These 1986 regulations were challenged in *Defenders of Wildlife v. Lujan*.¹⁸ In 1990, the United States

¹⁵ See *infra* notes 84-86 and accompanying text.

¹⁶ The language of the original regulations required "every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species." 43 Fed. Reg. 874 (1978) (codified at 50 C.F.R. § 402) (emphasis added).

¹⁷ The new rule, promulgated in 1986, cut back the scope of the consultation requirement within section 7 in two ways. First, the phrase "and in foreign countries" was struck from the provision defining the scope of section 7:

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds or carries out, *in the United States or upon the high seas* is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat.

51 Fed. Reg. 19,957 (1986) (codified at 50 C.F.R. § 402.01) (emphasis added). Compare with the 1978 regulation, *supra* note 16. Second, the term "action" as it appears in section 7 (e.g. "federal agency action") was assigned a regulatory definition for the first time in the 1986 regulation. "Action" was defined to include only agency actions within the United States, its territorial waters, or on the outer continental shelf:

"Action" means all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies *in the United States or upon the high seas*. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations, (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water or air.

51 Fed. Reg. 19,957 (1986) (codified at 50 C.F.R. § 402.02) (emphasis added).

¹⁸ *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987) (holding that plaintiffs did not have standing), *rev'd*, 851 F.2d 1035 (8th Cir. 1988) (holding that plaintiffs did have standing) [hereinafter *Defenders I*], *on remand*, 707 F. Supp. 1982 (D.

Court of Appeals for the Eighth Circuit upheld the district court decision which ordered the Secretary to rescind the 1986 regulations and to promulgate new regulations reinstating the application of section 7 to federal agencies' projects in foreign countries.¹⁹ Certiorari was granted by the United States Supreme Court in May, 1991 on the procedural issue of standing and on the merits.²⁰

Part I of this note provides an overview of the ESA. Part II presents the procedural history of *Defenders of Wildlife v. Lujan*. Part III provides the holding of the 1990 Eighth Circuit opinion. After discussing the Eighth Circuit's holding, Part IV comments on the domestic significance of the holding and compares the language of the ESA and the controversy over its extraterritorial application *in pari materia* with the language and history of a similar provision in the National Environmental Policy Act²¹ (NEPA). This comparison reveals an inconsistent United States foreign policy agenda regarding global environmental conservation and the author posits that this may be partly responsible for the gross lack of compliance with section 7 of the ESA. It is argued that, regardless of how the United States Supreme Court decides this case, legislative amendments, regulatory revisions and judicial intervention will continue to create, in effect, a piecemeal environmental foreign policy for the United States. While an evolution in statutory interpretation may be anticipated for most statutes, the evolution of environmental provisions applicable to agency actions in foreign countries is awkwardly filling a gap in United States foreign policy. If a clear policy were articulated by the State Department, one ex-

Minn. 1989) (holding that plaintiffs had standing and that the 1986 regulations violated the ESA), *aff'd sub nom.*, *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990) [hereinafter *Defenders II*], *cert. granted sub nom.* *Lujan v. Defenders of Wildlife*, U.S. (May, 1991). The defendant in this case is the Secretary of the Interior. In 1990, Secretary Manuel Lujan replaced former Secretary Donald P. Hodel.

Because the original proceeding in 1987 and the first appeal to the Eighth Circuit in 1988 (*Defenders I*) only addressed the issue of standing, they will not be analyzed at length. Instead, this note will focus on the 1989 remand to the District Court and the second appeal to the Eighth Circuit in 1990 (*Defenders II*), which rendered judgments on the merits.

¹⁹ *Defenders II*, 911 F.2d 117, 125 (8th Cir. 1990).

²⁰ *Lujan v. Defenders of Wildlife*, ____ U.S. ____, 111 S.Ct. 2008 (1991).

²¹ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1988).

pressing both the rationale for United States conservation efforts abroad and the priority to be given to such efforts, the various environmental statutes calling for agency responsibility abroad would grow to reflect a more systematic approach to environmental degradation. Clearer policy decisions from the Executive would also help to shake the inertia of noncompliance currently suffered by these statutory provisions. Part IV also assesses how the holding in *Defenders* supports the duty of the United States under international principles to apply the ESA to federal actions carried out in foreign countries and identifies the advantages that such federal statutory provisions have over purely international legal mechanisms in dealing with global environmental degradation.

I. OVERVIEW OF THE ENDANGERED SPECIES ACT AND SECTION 7

The Endangered Species Act (ESA)²² was enacted in 1973 to limit the extinction of endangered plant and animal species caused by economic growth and development²³ and by the commercial trading of animal and plant parts.²⁴ The "findings" set forth in the ESA convey the values Congress sought to affirm:

The Congress finds and declares that

. . . .
(3) these species . . . are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction. . . .²⁵

Using a sweeping approach, the ESA imposes duties on a range of potential United States actors: First, the Secretary is required to identify²⁶ and list²⁷ threatened and endangered spe-

²² Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 (1988)).

²³ 16 U.S.C. § 1531(b) (1988). See *supra* note 11 for the pertinent text of § 1531(b).

²⁴ See *id.* at §§ 1538(c)(1), (c)(2)(D), (d)(1).

²⁵ *Id.* at § 1531(a).

²⁶ "The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species. . . ." *Id.* at § 1533(a).

cies²⁸ worldwide; second, commercial traders and buyers of endangered species parts are prohibited from carrying on such trading and buying;²⁹ and third, in section 7, federal agencies are required to insure that their projects and other actions are not likely to jeopardize the continued existence of endangered species.³⁰

Focusing on section 7, federal agencies fulfill their requirement under section 7 by consulting with the Fish and Wildlife Service (FWS), an arm of the Department of the Interior, if they have evidence that their projects may threaten endangered species.³¹ This requirement to consult with FWS is the linchpin of section 7. Through consultation, an agency is held responsible to ensure that its actions or funding decisions are not likely to jeopardize the continued existence of any endangered species or

²⁷ "The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species." *Id.* at § 1533(c).

²⁸ Endangered species are defined as "any species which is in danger of extinction throughout all or a significant portion of its range. . . ." *Id.* at § 1532(6). Threatened species are defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at § 1532(20). The list of endangered and threatened species is included in the regulations to section 4, which are found at 50 C.F.R. § 17.11 (1990). It contains species of animals and plants found in the United States and in foreign countries and includes species that migrate between countries and continents. *Id.* As of May 1989, 507 of the 1,046 listed species were found outside of the United States. *Defenders II*, 911 F.2d 117, 123 (8th Cir. 1990). In addition, there are 71 listed species whose ranges include both the United States and foreign countries. *Id.* The list includes the known general distribution of each species within its historic range or habitat. 50 C.F.R. § 17.11 (1990). If an individual of a species is found outside of its historic range, the ESA is nonetheless to be applied: The regulations to section 4 state that the prohibitions in the ESA "apply to all individuals of the species, wherever found." *Id.* at § 17.11(e) (1990).

²⁹ See 16 U.S.C. §§ 1538(c)(1), (c)(2)(D), (d)(1) (1988).

³⁰ *Id.* at § 1536(a)(2). The duty imposed upon federal agencies stems from one of the major policy objectives of the ESA, which requires "every federal agency to implement its full authority to conserve both endangered and threatened species." *Id.* at § 1531(c)(1).

³¹ The directive to consult with the Secretary provides in pertinent part:

Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

16 U.S.C. § 1536(a)(4) (1988).

threatened species.³² After an agency begins the consultation process, FWS informs the agency of the endangered or threatened species that inhabit the area where the proposed action will occur.³³ FWS concludes the consultation process by issuing a "jeopardy" or "no jeopardy" opinion that projects whether or not the action will have an adverse impact on listed endangered or threatened species.³⁴ If a "no jeopardy" opinion is issued, the federal agency may proceed with its action or offer of funds without further duty to consult under the ESA. If a "jeopardy" opinion is issued, it must include alternative measures the federal agency may take to lessen or eliminate the harm the project would otherwise cause to the endangered species inhabiting

³² 16 U.S.C. § 1536(a)(2) (1988).

³³ 50 C.F.R. §§ 402.02(d), 402.12. *See generally* 50 C.F.R. § 402 (provides the consultation procedures).

³⁴ Section 7(b)(3)(A) provides that:

Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believed would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

16 U.S.C. § 1536(b)(3)(A) (1988).

If a "jeopardy" opinion is issued, further discussion with FWS is required under the regulations to discuss the implementation of alternatives. *See* 40 C.F.R. §§ 402.15, 402.16 (1990). The "jeopardy" or "no jeopardy" opinions may either be formal or informal. Informal consultations are preliminary, optional inquiries (often made by telephone) as to whether listed species inhabit a particular area. Provisions for informal consultations are found at 50 C.F.R. § 402.13 (1986). Through 1984, FWS records indicate that 20,375 informal consultations or about 3,000 per year were initiated by various federal agencies. FWS Div. Hab. Cons., Br. Fed. Act. files, Arlington, VA (File Code: 3.7.1 Consultation Statistics).

Once the agency has had meaningful consultation with the Secretary concerning actions which may affect endangered species, the final decision of whether or not to proceed with the action lies with the agency. *National Wildlife Federation v. Coleman*, 529 F.2d 359, *rehearing denied* 532 F.2d 1375, *cert. denied* 429 U.S. 979 (1976). *See also Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). However, if the Secretary's opinion contains a "jeopardy" finding, failure by the agency to implement *any* mitigating measures may be deemed a violation of the ESA. *See* 50 C.F.R. § 402.15 (1990). It may be difficult to convince a court that an agency refusing to take feasible measures to mitigate harm is nonetheless "insuring" that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such" species. 16 U.S.C. § 1536(a)(2) (1988).

the project area.³⁵

II. PROCEDURAL HISTORY OF *Defenders of Wildlife v. Lujan*

In 1986, Defenders of Wildlife, Friends of Animals and their Environment, and the Humane Society (Defenders) filed suit in the Minnesota District Court against the Secretary of the Department of Interior (Secretary) in order to challenge the 1986 regulations to section 7.³⁶ In the initial proceedings, Defenders claimed that the Secretary's 1986 regulations violated the ESA by eliminating the extraterritorial reach of section 7.³⁷ The district court dismissed that action for lack of subject matter jurisdiction and ruled that Defenders lacked standing to bring the action.³⁸ On appeal to the United States Court of Appeals for the Eighth Circuit,³⁹ the court reversed and remanded finding that Defenders had standing to challenge the regulations.⁴⁰

On remand, the district court addressed the merits of the case for the first time.⁴¹ The court granted Defender's motion for summary judgment on the issue of whether the 1986 regulations contradicted section 7 of the ESA.⁴² The court adopted the standard of review cited by the Secretary. Under this analysis, environmental statutes are presumed to have domestic scope unless a broader scope is expressly stated in the plain language of the statute.⁴³ The court found the general, all-inclusive language of

³⁵ *Id.*

³⁶ *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987).

³⁷ *Id.*

³⁸ *Id.* at 48.

³⁹ *Defenders I*, 851 F.2d 1035 (8th Cir. 1988).

⁴⁰ *Id.* at 1045. In *Defenders I*, the majority opinion noted that Defenders had alleged specific projects in foreign countries, which members had visited, that were increasing the rate of extinction of endangered species. *Id.* The court's holding that Defenders had standing was based on two grounds. First, the court found that this sort of interest "will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected." *Id.* at 1040 (citations omitted). Second, the majority found that Defenders had pleaded a procedural harm traceable to the Secretary's failure to require consultation for projects in foreign countries, and that a decree reversing that interpretation would redress Defenders' injuries. *Id.* at 1041-44.

⁴¹ *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1084 (D. Minn. 1989).

⁴² *Id.* at 1086.

⁴³ *Id.* at 1084. The presumption of domestic application is expressed in an environmental case in *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977), which is cited by the Secretary as authority for its argument as to the appropriate standard of review. *Id.*

section 7 to be compelling evidence of Congress' intent to apply section 7 to agency projects in foreign countries.⁴⁴ The court asserted that:

[t]he language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.⁴⁵

The court acknowledged that the use of all-inclusive language in the statute, by itself, is not enough to demonstrate the specific and clear intent of Congress.⁴⁶ In addition, the court based its finding on the legislative history of the ESA and the appearance throughout the ESA of an overall international concern.⁴⁷

Some emphasis was given to the amendments later made to section 7 following the promulgation of the 1978 regulations. These amendments left the relevant portion of the consultation provision untouched.⁴⁸ The district court characterized Congress' reaffirmation of the consultation provision as a "stamp of

⁴⁴ The court found the all-inclusive language of section 7 to be the most compelling evidence of Congress' intent to apply this provision to federal agency actions abroad:

The court finds that the ESA plainly states that federal agencies are required to consult with the Secretary regarding projects in foreign countries. Congress' clear intent that this is so can, for the most part, be determined without resort to legislative history. Section 1536 clearly states that each federal agency must consult with the Secretary regarding any action which could jeopardize any endangered or threatened species.

Id. at 1085.

⁴⁵ *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1084, 1084-85 (D. Minn. 1989) (citations omitted) (emphasis in original).

⁴⁶ *Id.* at 1085 (citing *Mitchell*, 553 F.2d at 1003).

⁴⁷ *Id.* at 1085.

⁴⁸ *Id.* at 1085-86. The court cited the Conference Report on these amendments, which indicated that no substantive changes were intended for the consultation provisions:

The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

Id. (citing H.R. CONF. REP. No. 1084, 95th Cong., 2d Sess. 18 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9,453, 9,486 (emphasis added)).

approval,"⁴⁹ intended to codify the 1978 regulations.⁵⁰ This is the only piece of legislative history the court found useful.⁵¹

The district court cited several provisions of the ESA to support its finding of an overall international concern in the ESA. The court first looked to section 2 wherein the United States pledges itself to conserve, to the extent practicable, wildlife throughout the world.⁵² The court found further evidence of an intent to apply section 7 to federal actions abroad in: (1) section 3(6), which does not limit the definition of "endangered species" to those found only within the United States;⁵³ (2) section 8, which specifically deals with "international cooperation" regarding endangered species;⁵⁴ and (3) section 9(a), which prohibits various actions, wherever occurring, by anyone subject to the jurisdiction of the United States.⁵⁵ Continuing the comparison with section 9, the district court reasoned:

[C]ongress knew that not *all* portions of the ESA were to apply worldwide. Where they did not want the prohibitions to have ef-

⁴⁹ *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1086 (D. Minn. 1989).

⁵⁰ *Id.*

⁵¹ *Id.* at 1085.

⁵² The district court reasoned:

The court has made this determination well aware . . . that congressional intent to apply a statute extraterritorially must go beyond the use of inclusive language. The court finds that additional intent in several places. First, Congress' concern with the international aspects of the endangered species problem is unmistakable and appears repeatedly throughout the statute. Section 1531 states that the United States has pledged itself to conserve, to the extent practicable, the wildlife throughout the world.

Id. at 1085.

⁵³ *Id.* "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range. . . ." 16 U.S.C. § 1532(6) (1988).

⁵⁴ *Id.* Section 8 is entitled "International Cooperation" and provides:

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation. . . .

16 U.S.C. §§ 1537(b)(1), (2) (1988).

⁵⁵ *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1085 (D. Minn. 1989). Section 9(a) provides: [I]t is unlawful for any person subject to the jurisdiction of the United States to—import any such species into, or export any such species from the United States. . . ." 16 U.S.C. § 1538(a)(1)(A) (1988).

fect outside the United States, inclusive language was not used. Section 1536's [section 7's] all-inclusive language, when contrasted with the discriminatory language of section 1538 [section 9], cannot be considered sloppiness on the part of Congress but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.⁵⁶

Based on this analysis, the district court held that the 1986 regulations contradicted the ESA.⁵⁷ The district court ordered the Secretary to revoke and rescind that portion of the 1986 regulations that limited the consultation duty to agency actions in the United States or on the high seas.⁵⁸ Further, the Secretary was ordered to publish regulations "clearly recognizing the full mandate of section 7 . . . expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found."⁵⁹

In response to this remand proceeding, the Secretary appealed to the Eighth Circuit a second time.⁶⁰ He again argued that the district court erred in holding both that Defenders had standing and that Congress intended for the ESA to apply to United States agency projects carried out in foreign countries.⁶¹

⁵⁶ *Id.* at 1085 (emphasis in original).

⁵⁷ *Id.* The court reasoned that:

The conference committee's "stamp of approval" of the worldwide scope of section 7, in addition to the all-inclusive language of the statute and the international concerns expressed throughout the ESA, leaves the court with the belief that the intent of Congress is clear.

Congress intended that section 1536's consultation requirements were to apply to all actions, including those in foreign countries. It follows from this finding that the 1986 regulations promulgated by the Secretary of the Interior which limited the application of the ESA to those activities occurring within the United States or on the high seas are contrary to the ESA. Summary judgment will be granted in favor of Defenders on that basis.

Id. at 1086.

⁵⁸ *Id.* at 1086.

⁵⁹ *Id.*

⁶⁰ *Defenders II*, 911 F.2d 117 (8th Cir. 1990).

⁶¹ *Id.* at 118.

III. HOLDING OF THE EIGHTH CIRCUIT (*Defenders II*)

The issue before the Eighth Circuit in *Defenders II*⁶² was whether the 1986 regulations contradicted the ESA.⁶³ The Eighth Circuit held that the plain language and legislative and regulatory history of the ESA demonstrated Congress' intent to apply the consultation requirement of section 7 to federal projects carried out in foreign countries.⁶⁴ The court affirmed the district court decision invalidating the relevant portion of the 1986 regulations and ordering the Secretary to promulgate new regulations that conform to the original 1978 version.⁶⁵

In reviewing the Secretary's interpretation of section 7, as reflected in the 1986 regulations, the Eighth Circuit used the standard of review for agency actions developed in *Chevron U.S.A. v. Natural Resources Defense Council*,⁶⁶ (*Chevron* standard). The *Chevron* standard is a two-part test. The first part requires the court look to the plain meaning of the enabling statute in question.⁶⁷ If the statute unambiguously speaks to the issue at hand, the court must defer to the plain meaning entirely and assess whether the agency's action complied with the express statutory language.⁶⁸ If, however, the court determines that the statute is silent or ambiguous on the issue, the court must then proceed to the second part of the *Chevron* standard and compare the regulatory history to the corresponding legislative history in order to determine whether the agency's interpre-

⁶² *Defenders II*, 911 F.2d 117 (8th Cir. 1990).

⁶³ *Id.* at 118. The issue of standing was also raised and resolved in favor of Defenders. *Id.* at 122.

⁶⁴ *Id.* at 123.

⁶⁵ *Id.* at 125. See also *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1086 (D. Minn. 1989).

⁶⁶ *Id.* at 122. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁶⁷ The *Chevron* standard is a two-part test. The first part requires as follows: When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Defenders II, 911 F.2d 117, 122 (8th Cir. 1990) (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).

⁶⁸ *Id.*

tation is based on a permissible construction of the statute.⁶⁹

A. *The Plain Language of the ESA*

In *Defenders II*, the Eighth Circuit analyzed section 7, under the first part of the *Chevron* standard, to determine whether the plain language of section 7 provided a clear expression of congressional intent to apply the consultation requirement to agency actions in foreign countries.⁷⁰ Section 7 provides in pertinent part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any action* authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of *any endangered species* or threatened species or result in the destruction or adverse modification of habitat of such species. . . .⁷¹

The court remarked on the all-inclusive language used in section 7, which "admits to no exceptions,"⁷² but recognized that the use of all-inclusive language in one particular section of the ESA does not demonstrate unambiguous congressional intent that section 7 apply extraterritorially.⁷³ Thus far, the Eighth Circuit's analysis did not differ from that of the district court.⁷⁴

The court then searched the language of the ESA as a whole, under the first part of the *Chevron* standard, for an unambiguous expression of congressional intent. Relying on the United States Supreme Court's extensive discussion of the ESA's purpose in *Tennessee Valley Authority v. Hill*,⁷⁵ the

⁶⁹ The Eighth Circuit, quoting the *Chevron* standard, continued:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

⁷⁰ *Defenders II*, 911 F.2d 117, 122 (8th Cir. 1990).

⁷¹ 16 U.S.C. § 1536(a)(2) (1988) (emphasis added).

⁷² *Defenders II*, 911 F.2d at 122.

⁷³ *Id.* "We recognize, however, that the use of all-inclusive language in the particular section of the Act is not determinative of the issue." *Id.*

⁷⁴ See *supra* notes 43-47 and accompanying text.

⁷⁵ 437 U.S. 153, 184 (1978).

Eighth Circuit recalled the Act's ambitious purpose: "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, *but in literally every section of the statute.*"⁷⁶ The court then presented a review of the ESA and identified the international context in which Congress intended the act to function.⁷⁷ This part of the court's analysis was also similar to that of the district court, which identified an "overall international concern" in the ESA.⁷⁸ Concluding that congressional intent could be gleaned from the express language of the ESA, the court held that it owed no deference to the Secretary's contrary construction of the act as found in the 1986 regulation.⁷⁹ The court, reaffirming its inherent authority to so decide, asserted that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."⁸⁰

B. *The Legislative and Regulatory History of Section 7*

Having found the plain language of section 7 unambiguous on the issue of whether section 7 applies to agency actions in foreign countries, the Eighth Circuit could have ended its review

⁷⁶ *Defenders II*, 911 F.2d 117, 122 (8th Cir. 1990) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. at 184 (1978) (emphasis in original)).

⁷⁷ Judge Alsop relied on specific portions of the ESA, noting that Congress has declared that the "United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." *Id.* at 122 (quoting 16 U.S.C. § 1531(a)(4) (1988)). The ESA lists various international agreements that guide this pledge and declares that one of the purposes of the ESA is to take appropriate steps to achieve the goals of the international treaties and conventions listed there. *Id.* at 122-23 (citing 16 U.S.C. § 1531(b) (1988)). Further, the ESA defines "endangered species" broadly and without geographic limitations. *Id.* at 123 (citing 16 U.S.C. § 1532(6) (1988)). The Secretary must determine which species are endangered according to procedures in the ESA. These procedures are not limited to domestic species and must take into account "those efforts, if any, being made by any state or foreign nation . . . to protect such species. . . ." *Id.* at 123 (quoting 16 U.S.C. § 1533(b)(1)(A) (1988)). The Secretary is also required to give actual notice to and invite comment from each foreign nation in which species proposed for listing as endangered are found. *Id.* at 123 (citing 16 U.S.C. § 1533(b)(5)(B) (1988)).

⁷⁸ See *supra* notes 52-57 and accompanying text.

⁷⁹ *Defenders II*, 911 F.2d 117, 123 (8th Cir. 1990).

⁸⁰ *Id.* at 123 (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984)).

of the Secretary's 1986 regulations. Nevertheless, the court proceeded to the second part of the *Chevron* standard.⁸¹ The second part of the test is triggered by statutes that are silent or ambiguous on the issue that is the subject of agency regulation. This examination was somewhat more detailed than that of the district court.⁸² The Eighth Circuit concluded that the Secretary's rationale for eliminating extraterritorial scope in 1986 was poorly reasoned.⁸³ In doing so, the court examined the history of the original 1978 regulation, the amendment to the ESA that occurred later in 1978, and compared these with subsequent regulatory changes in 1986 that made the ESA inapplicable to federal agencies' projects carried out in foreign countries.

The regulatory history of section 7 features two years of debate and comment prior to the promulgation of the first final regulations in 1978. After the initial rule making process began, the former Secretary, Donald P. Hodel, solicited comments from government agencies in April, 1976.⁸⁴ The Army Corps of Engineers, the State Department and the Defense Department were opposed to the extraterritorial application of section 7.⁸⁵ The Council on Environmental Quality, the Interior Department Solicitor's Office, and the General Counsel's Office for the National Oceanic and Atmospheric Administration took the position that the consultation duty extended to foreign countries.⁸⁶

After having considered comments for two years, the Secretary published the first final rule on January 4, 1978, providing that: "Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species."⁸⁷

The Eighth Circuit, like the district court, acknowledged

⁸¹ *Id.* at 123.

⁸² See *supra* notes 48-51 and accompanying text.

⁸³ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990).

⁸⁴ Section 7 was interpreted for the first time in 1976 when the Fish and Wildlife Service of the Department of Interior issued "guidelines" to assist agencies in complying. As is customary, the initial guidelines were not binding upon agencies, however, their scope did extend to agency activities affecting listed species in foreign countries. 42 Fed. Reg. 4,868-69 (1977).

⁸⁵ *Defenders II*, 911 F.2d 117, 123.

⁸⁶ *Id.*

⁸⁷ 43 Fed. Reg. 874 (1978) (codified at 50 C.F.R. Part 402) (emphasis added).

this early regulatory history and then reviewed the amendments to section 7⁸⁸ that were subsequently passed in November of 1978.⁸⁹ The Conference Report on these amendments indicated that no substantive changes were intended for the consultation provisions of section 7:

The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision by retaining existing law, was preferable *since regulations governing section 7 are now familiar to most Federal agencies* and have received substantial judicial interpretation.⁹⁰

Because "existing law" included the 1978 regulations requiring extraterritorial application, the Eighth Circuit held that the above language was strong evidence of the Conference Committee's approval of the 1978 regulation.⁹¹ The extensive commentary leading up to the 1978 rule making led the court to believe that Congress was aware of the extraterritorial scope given to the consultation provision in the 1978 regulation.⁹²

The Eighth Circuit then compared the pre-1978 commentary on the regulations and the Conference Report on the 1978 amendments with the regulatory history of the 1986 regulation.⁹³

⁸⁸ Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752. The amendments considerably lengthened Section 7 by adding exemption provisions and empowering a new Endangered Species Committee to grant them. 16 U.S.C. §§ 1536(e)-(f) (1988).

⁸⁹ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990). See also *supra* notes 47-50 and accompanying text.

⁹⁰ H.R. CONF. REP. NO. 1084, 95th Cong., 2d Sess. 18 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9,453, 9,486 (emphasis added).

⁹¹ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990).

⁹² The Secretary had argued before the Eighth Circuit that the court should be extremely hesitant to presume general congressional awareness of agency practices based on "a few isolated statements in the thousands of pages of legislative documents." *Id.* at 124 (quoting *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978)). The court distinguished the 1976-1978 regulatory history from one providing a few, isolated statements, but did not further address this argument. *Id.*

⁹³ The court cited a 1983 notice of proposed rule making. It stated that this proposed regulation "eliminated the need for consultation or foreign projects and defined 'action' to exclude foreign activities." *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990). The 1983 proposed rule interprets section 7 as follows:

Section 7(a)(2) requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds or carries

The 1986 regulations eliminated consultation on foreign projects and defined "action" (e.g. federal agency "action") to exclude activities in foreign countries.⁹⁴ The Secretary attributed the elimination of extraterritorial application to "the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] amendments, and because of the potential for interference with the sovereignty of foreign nations."⁹⁵ In the published explanation of the new rule, no evidence was given to support this conclusion.⁹⁶ The description of the final regulations adds:

although consultations on Federal actions in foreign countries will not be conducted under this rule, the [Fish and Wildlife] Service maintains its strong commitment to the preservation of species and habitat worldwide. The Service will continue to list species which are found outside of United States jurisdiction when they are determined to be endangered or threatened.⁹⁷

In assessing the Secretary's rationale, the Eighth Circuit acknowledged that an administrative agency is not disqualified

out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

48 Fed. Reg. 29,997 (1983). The proposed regulation also added a definition for the term "action":

"[a]ction" means all activities of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. Examples include, but are not limited to: (a) the promulgation of regulations; (b) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (c) actions directly or indirectly causing modifications to the land, water or air.

Id. at 29,998.

This proposed regulation eliminated the language in the 1978 rule that had applied section 7 to agency actions "in the United States, upon the high seas, and in foreign countries." 50 C.F.R. § 402 (1979). *See supra* note 16.

⁹⁴ *See supra* notes 16-17 and accompanying text.

⁹⁵ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990) (citing Appellant's App. at 84). In fact this language comes from the analysis of the 1986 rule in the Federal Register. The "Section by Section Analysis" of the rule provides in full:

The 1978 rule extended the scope of section 7 beyond the territorial limits of the United States to the high seas and foreign countries. The proposed [1983] rule cut back the scope of section 7 to the United States, its territorial sea, and the outer continental shelf, because of the apparent domestic orientation of the consultation and exemption processes resulting from the Amendments, and because of the potential for interference with the sovereignty of foreign nations.

⁵¹ Fed. Reg. 19,929 (1986).

⁹⁶ *See generally* 51 Fed. Reg. 19,926 (1986).

⁹⁷ *Id.* at 19,930.

from changing its mind,⁹⁸ and that substantial deference is appropriate if there appears to have been good reason for the change.⁹⁹ With regard to the 1986 regulation, however, the court found that the Secretary's rationale fell "far short when examined in the context of the Act's language and legislative history."¹⁰⁰

The court addressed the Secretary's first argument that the consultation requirement was domestically oriented. The Secretary had supported this argument primarily by pointing to the 1978 amendments to section 7, which had created exemptions from the consultation duty.¹⁰¹ The amended statute states that exemptions will only be granted if "the action is of regional or national significance."¹⁰² Because granting exemptions requires the weighing of public interests,¹⁰³ the Secretary argued that having one country weigh the public interests of another would be a gross intrusion upon the sovereignty of foreign nations.¹⁰⁴ The Eighth Circuit did not find this persuasive evidence of an overall domestic orientation of the ESA or of the consultation provision. The court asserted that the exemption provisions were not necessarily domestic in scope.¹⁰⁵

The Secretary's second argument that section 7 is domesti-

⁹⁸ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990) (quoting *NLRB v. Local Union No. 103, Int'l Ass'n of Iron Workers*, 434 U.S. 335, 351 (1978)).

⁹⁹ *Id.* at 124, (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

¹⁰⁰ *Id.* at 124.

¹⁰¹ *Id.* See, 16 U.S.C. §§ 1536 (e)-f (1988).

¹⁰² 16 U.S.C. § 1536(h)(1)(A)(iii).

¹⁰³ *Id.* at § 1536(h)(1)(A)(ii).

¹⁰⁴ *Defenders II*, 911 F.2d 117, 125 (8th Cir. 1990).

¹⁰⁵ *Id.* at 125. The argument that the exemption provisions is domestic in scope was asserted as follows. Applications for exemptions may be made by the Governor of the state involved. 16 U.S.C. § 1536 (1988) ("the Governor of the State in which an agency action will occur, *if any* . . . may apply to the Secretary for an exemption." *Id.* at § 1536(g)(1) (emphasis added); see also 16 U.S.C. § 1536(g)(2)(B)(1)(i). The Secretary argued that this language, which requires Governors to apply, implied that only domestic projects were contemplated. *Defenders II*, 911 F.2d 117, 125 (8th Cir. 1990). The court rebutted this argument by emphasizing the qualifying language in that provision (i.e., "the Governor of the State in which an agency action will occur, *if any*. . .") to imply that the action involved need not occur in one of American states. *Id.* The court concluded: "Again, we are unpersuaded. . . . This language, when considered with the substantive and persuasive evidence previously discussed, leads us to conclude that the exemption provisions do not limit the consultation requirement geographically." *Id.* at 125 (emphasis added).

cally oriented referred to the treatment, in section 7(a)(2), of the critical habitat provisions of section 4.¹⁰⁶ The Secretary argued that the critical habitat provisions in section 4 are domestic in scope, that Congress would not have referred, in section 7(a)(2), to both the critical habitat provisions and the consultation requirement and expected each to have different reach; one domestic and one extraterritorial.¹⁰⁷ The court, however, found the critical habitat provisions of section 4 and the consultation provisions of section 7, both of which are referred to in section 7(a)(2), to be severable because the designation of critical habitats is governed by different procedures and standards than the listing of endangered species.¹⁰⁸

After discussing the exemption and critical habitat provisions, the court did not address any of the other provisions of the ESA that, according to the Secretary, revealed congressional intent to apply section 7 only to domestic federal agency projects. The court simply concluded: "We have carefully considered these arguments and believe that they do not compel a different result here. They merit no further discussion."¹⁰⁹

Lastly, to support his argument that section 7 is domestically oriented, the Secretary relied heavily on the canon of statutory construction that statutes are presumed to have domestic scope only.¹¹⁰ To overcome the presumption that a statute is domestic in scope, there must be clear expression of such congressional intent.¹¹¹ This presumption was adopted and applied by the district court and by the Eighth Circuit.¹¹² Both courts rebutted the presumption by finding such express intent in the plain language of the ESA.¹¹³

¹⁰⁶ *Defenders II*, 911 F.2d 117, 124 (8th Cir. 1990).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 124-25. Compare 16 U.S.C. §§ 1533(b)(1)(A)-(B) (indicating how endangered species are to be identified) with 16 U.S.C. § 1533(b)(2) (indicating how critical habitats are to be designated).

¹⁰⁹ *Defenders II*, 911 F.2d at 125.

¹¹⁰ *Id.* at 125 (citing *Foley Bros. v. Filardo*, 336 U.S. 281 at 285 (1948)). The presumption that statutes are domestic in scope was relied upon and rebutted by the district court. See *infra* text accompanying notes 43-47. This analysis is contrasted with the Eighth Circuit's analysis, which primarily reviews the scope of regulatory agencies' authority to interpret their enabling legislation through the regulations they promulgate.

¹¹¹ *Id.* (citing *United States v. Mitchell*, 553 F.2d at 1003 (5th Cir. 1977)).

¹¹² See *supra* notes 43, 44 and accompanying text.

¹¹³ See, *id.*; *Defenders II*, 911 F.2d at 125.

After concluding that the ESA is not domestically oriented, the Eighth Circuit analyzed the second aspect of the Secretary's rationale for the 1986 regulation. The discussion of the 1986 regulations published in the *Federal Register* alleges that the extra-territorial reach of the 1978 regulations would potentially interfere with the sovereignty of other countries.¹¹⁴ This interference, it was argued, would adversely impact on foreign relations.¹¹⁵ The Eighth Circuit disposed of this claim in a brief paragraph. Rather than interfering with the sovereign right of foreign nations to strike their own balance between development and environmental conservation, the court reasserted that section 7 is directed only at the actions of United States federal agencies.¹¹⁶ The court remarked that Congress remains free to amend the ESA and restrict the scope of the consultation clause if congressional concern for foreign relations (e.g. an alleged interference with the sovereignty of another nation) outweighs its concern for wildlife.¹¹⁷ The court, however, would not make such a decision on Congress' behalf.¹¹⁸

Based on the foregoing analysis, the court concluded that Congress intended the ESA consultation requirement to apply to agency projects in foreign nations, as well as to projects in the United States or on the high seas.¹¹⁹

¹¹⁴ *Defenders II*, 911 F.2d at 125. See 51 Fed. Reg. 19,929 (1986).

¹¹⁵ *Defenders II*, 911 F.2d at 125. See 51 Fed. Reg. 19,929 (1986).

¹¹⁶ *Defenders II*, 911 F.2d at 125.

¹¹⁷ The court reasserts the limitation on the judiciary to decide statutory policy issues stating:

The Secretary also expresses concerns about the impact on foreign relations stemming from extraterritorial application of the consultation duty. It urges that such a construction would be viewed as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species. We note initially that the act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

Id. at 125.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

IV. ANALYSIS

A. *Analysis of the Eighth Circuit's Holding*

The Eighth Circuit analyzed the 1986 regulations under both parts of the *Chevron* analysis even though it found a sufficient basis for striking the pertinent portion of the regulations under the first part alone. While the court takes a definitive stand, its holding rests upon the uncertainties that accompany analyses of legislative and regulatory histories. The United States Supreme Court will presumably engage in the same process, consult the same histories, and draw its own conclusions.

An examination of regulatory history, compared to that of legislative history, is particularly difficult because comments on proposed regulations are largely unpublished. Without a daily verbatim transcription, such as the *Congressional Record*, forays into regulatory history entail behind-the-scenes inquiries into comment letters received by the promulgating agency. In this case, it is never made entirely clear whether the court is reviewing the rationale offered *at the time* the 1986 regulations were promulgated or whether the court entertained new and additional arguments posed by the Secretary during the court proceedings.

If agencies are not held accountable for their reasoning at the time of rule making, *ad hoc* justifications may be added after the fact. The *Chevron* mandate for rational rule making thereby becomes one for rational retrospective justifications.

These obstacles are inherent in any attempt to glean either congressional intent or agency reasoning from their respective documented histories. The district court restricted its ventures into these waters while the Eighth Circuit waded waist-high. Both court opinions selected the arguments they found most compelling from the items of documented history brought before them. As environmental statutory provisions are litigated, this selection process will differ from court to court.

Essentially, it was the plain, all-inclusive language of section 7 that persuaded both the district court and the Eighth Circuit. It is arguable that many of the other provisions of the ESA and its history are sufficiently general if not vague to permit hot debate as to the scope Congress intended to give the ESA.

Absolute statutory mandates for conservation combined

with vague terms in the more procedural provisions of the ESA have required the courts to rummage through the regulatory and legislative histories in hopes of finding a clearly stated indication of the rationale that lies behind section 7's all-inclusive language. It may be argued that the statutory language reflects unresolved questions regarding the priority Congress and the Executive sought to place on the worldwide conservation of endangered species. During the 1970s, while the absolute terms of the ESA had yet to be challenged, crucial questions about the rationale behind the act could lie dormant. It has been argued that the 1978 amendments, which provided a committee to decide upon exemptions, represent the first attempt to lessen the broad mandate to save all species.¹²⁰ When legislative exemptions became possible, the "spirit," not just the letter, of the Act came under scrutiny and it became necessary to ask which applications of the general rule that all species must be protected were most important.¹²¹ The 1986 regulations to section 7, promulgated by the Secretary, may be viewed as a second attempt to loosen the absolute statutory mandates of the ESA. These regulations, which eliminated federal agency liability for the harm agencies cause to endangered species abroad, came from the Department of Interior, an arm of the Executive. The United States Supreme Court will determine whether or not these regulations will be upheld.

In addition to the exemption provisions, and an attempt to amend the scope of section 7 in the 1986 regulations, day-to-day implementation has revealed that simply to decree that all species are to be saved does not automatically ensure that they will be, in the face of shortages of appropriations and a failure of initiative by agencies.¹²² Faced with inevitable priority choices, the remaining question is whether these priority decisions will be made according to a rationally discussed and consensually adopted foreign policy, supported by the Executive, or whether they will be left to whim or chance. The development of the ESA and other federal environmental statutes, and the lack of compliance with section 7 in particular may largely be due an

¹²⁰ See NORTON, WHY PRESERVE NATURAL VARIETY? 3-6 (1987).

¹²¹ *Id.*

¹²² *Id.*

inconsistent environmental foreign policy articulated by the Executive.

B. *Comparing ESA Section 7 with NEPA Section 102(2)(F)*

A comparison of ESA section 7 with a similar provision in the National Environmental Policy Act¹²³ (NEPA) reveals the lack of a coherent, consensual, federal foreign policy toward environmental conservation that can systematically be applied to United States actions in foreign countries. NEPA was enacted in 1969, just four years before the ESA,¹²⁴ and requires every federal agency to include a detailed environmental impact statement (EIS) in proposals for major federal actions significantly affecting the environment.¹²⁵

1. *NEPA*

NEPA section 102(2)(F) imposes requirements on federal agency actions that take place in foreign countries. It provides:

[A]ll agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems and, *where consistent with the foreign policy of the United States*, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.¹²⁶

¹²³ National Environmental Policy Act of 1969, § 101, 102(2)(F), 42 U.S.C. § 4321, 4332(2)(F) (1988).

¹²⁴ See *supra* note 11.

¹²⁵ The lynch pin of NEPA is found in section 102(2)(C), which requires the preparation of environmental impact statements (EISs):

The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action. . . .

42 U.S.C. § 4332(2)(C) (1988). The section goes on to require consultation regarding the potential adverse environmental impacts that a particular project may cause: "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." *Id.* Compare with *supra* note 30 (provides the language of section 7 of the ESA).

¹²⁶ 42 U.S.C. § 4332(2)(F) (1988) (emphasis added).

During NEPA's twenty-year history, arguments against the application of section 102(2)(F) to United States' actions abroad have been raised and resolved in favor of an extraterritorial interpretation on a case-by-case basis.¹²⁷ Reading the 1986 regulations to ESA section 7 *in pari materia* with NEPA section 102(2)(F) reveals a fundamental inconsistency in the Executive's position regarding the United States duty to conserve the global environment. This inconsistency produces confusion within federal agencies and permits continued decimation of endangered species abroad. A comparison with NEPA also demonstrates that the State Department is the most critical player in the long-term effectiveness of either provision.

An examination of the case law interpreting the application of NEPA to United States actions abroad reveals that a case-by-case analysis will be applied under section 102(2)(F).¹²⁸ Under these cases, an EIS need not be prepared for federal actions abroad if it would impede United States foreign policy.¹²⁹ The legislative history of NEPA offers little clarification of Congressional intent with regard to section 102(2)(F), which has been a part of NEPA from its inception in 1969.¹³⁰ In 1979, President Carter responded to litigation that granted extraterritorial scope to NEPA by issuing Executive Order 12114.¹³¹ This order requires the use of an environmental impact assessment for: (1) "major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (*e.g.*, the oceans of Antarctica);"¹³² (2) when an action will affect a

¹²⁷ See, *e.g.*, *infra* note 128.

¹²⁸ See *NRDC v. Nuclear Regulatory Commission*, 647 F.2d 1345 (D.C. Cir. 1981); *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975); *Sierra Club v. Coleman*, 405 F. Supp. 53, and 421 F. Supp. 63 (D.C. 1980); *National Organization for the Reform of Marijuana Laws v. Department of State*, 452 F. Supp. 1226 (D.C. 1978).

¹²⁹ *Id.*

¹³⁰ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 853 (codified as amended at 42 U.S.C. §§ 4331, 4332(2)(F) (1988)). Because the preparation of an environmental impact statement (EIS) under NEPA requires a period of public comment, foreign policy regarding United States national security could be impaired by requiring an EIS for sensitive agency projects abroad. See *supra* note 125 for the text of the NEPA provision requiring the preparation of EISs.

¹³¹ 44 Fed. Reg. 1,957 (1979).

¹³² Exec. Order No. 12114, 32 C.F.R. 197 (1991), *reprinted in* 42 U.S.C. § 4332 app. at 978-79 (1988).

third or otherwise uninvolved nation;¹³³ (3) when an action is strictly regulated in the United States (e.g. actions involving radioactive materials or toxic substances);¹³⁴ or (4) when the President or Secretary of State designates a natural or ecological resource to be of global importance.¹³⁵

2. *The ESA and NEPA*

In contrast to NEPA, the duty to perform a section 7 consultation does not depend upon whether a particular project, on a case-by-case basis, would interfere with foreign policy (e.g. national security). Rather, the Secretary of the Interior's 1986 regulations *eliminated* the duty to perform section 7 consultations on projects conducted abroad by promulgating the 1986 regulations. This was done with the support of the Executive via the State Department.¹³⁶ The Secretary's justification was not that consultation could cause possible, situation-dependent interference with foreign policy, as was the case in the NEPA analysis. Instead, the justification was that there would be a necessary interference with the foreign sovereignty of any nation where an agency project was conducted.¹³⁷

The 1978 exemption provisions to the ESA offered the first signal that day-to-day implementation of absolute statutory mandates to conserve all species was impracticable and unsupported by subsequent sessions of Congress. The second signal was the Secretary's promulgation of the 1986 regulations which eliminated the extraterritorial scope of the consultation provisions; it stemmed from the Executive. Looking beyond the ESA to NEPA, an environmental statute that is similarly broad in its mandate and which provides a corresponding exception based on foreign policy, reveals an arguable pattern. When absolute, statutory mandates, which are designed to preserve *all* endangered species or to assess *any and all* projected environmental harm associated with federal projects, prove to be either impracticable

¹³³ *Id.* at 978.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *supra* notes 84-86 for reference to the State Department's opposition to the extraterritorial application of section 7.

¹³⁷ See *supra* notes 94-95 and accompanying text.

or insufficiently supported by the Executive, an *ad hoc* response of amendment, regulation and court deliberation may result. The role of the courts, and currently that of the United States Supreme Court, becomes that of preventing the uncoordinated or sporadic attempts from entirely evading the spirit and intent of the agencies' enabling legislation, assuming the intent or rationale has been articulated by Congress.

Until the United States Executive, largely through the State Department, decides upon the rationale for and the priority to be given to environmental conservation abroad, and until it constructs a coherent foreign policy to embrace this rationale, further statutory and regulatory amendments and judicial intervention will create the equivalent of the United States environmental foreign policy, but in an inconsistent fashion. If a cohesive environmental foreign policy were articulated, regulations and statutes could be amended to more uniformly reflect a more measured and systematically applied approach.

3. *Compliance With ESA Section 7 and NEPA Section 102(2)(F) to Date*

Regarding the implementation of section 7, no consultations have been completed since 1973 with regard to federal agency actions abroad.¹³⁸ The federal agencies most frequently involved in projects abroad are the Army Corps of Engineers and the Agency for International Development (AID).¹³⁹ Although one consultation was initiated in 1978 with regard to the Aswan dam

¹³⁸ Telephone interview with Ralph Swanson, Section 7 Coordinator, Federal Activities Branch, Habitat Conservation Division, Fish & Wildlife Enhancement Program, FWS (Feb. 28, 1990).

¹³⁹ Telephone interview with Christine Enright, Section 7 coordinator, FWS (Feb. 26, 1990). The agencies that most frequently complete section 7 consultations regarding domestic projects are the Bureau of Land Reclamation, whose projects usually involve the construction of dams and water delivery systems in the western states; the Bureau of Land Management, whose projects primarily involve mining, rasing and timbering activities west of the Rocky Mountains; the Army Corps of Engineers, whose projects frequently involve public lands, including mining, timbering and water diversion projects in the eastern states; the Environmental Protection Agency, which finances a variety of projects that require consultation through various environmental statutory grant programs; the Forest Service; and the Military. FWS targets these agencies for special attention to compliance with section 7 because of the scope of their activities. However, these and other agencies conduct projects abroad and all of them should be consulting with the Secretary pursuant to section 7. *Id.*

in Sri Lanka, no final jeopardy opinion was filed.¹⁴⁰ After publication of the 1978 regulation, the State Department notified the FWS that it disapproved. The State Department asserted that "an analysis [i.e. section 7 consultation] by a United States agency of the impacts on endangered and threatened species in, and policy options available to, foreign countries may be perceived by them as an unwarranted interference in matters within their jurisdiction."¹⁴¹

Instead of implementing the 1978 regulations and completing a section 7 consultation regarding the water diversion project in Sri Lanka, the State Department and the Agency for International Development (AID) worked informally with FWS to obtain advice regarding endangered species protection.¹⁴² The rationale for this decision to terminate the section 7 consultation was that AID ended the federal agency "action" by completing its loan to Sri Lanka for the project in 1977, prior to the promulgation of the 1978 regulations requiring section 7 consultations for federal agency actions in foreign countries.¹⁴³

This single attempt to apply section 7 to a United States agency project abroad is symptomatic of what may be called the larger illness. Implementation of broad statutory mandates without an articulated environmental foreign policy and without Executive support for the legislative mandates will be sporadic or contrived at best.

Although NEPA sections 102(2)(C) and (F) apply to major federal actions abroad, this provision has fallen into a similar pattern of disuse. For example, many agencies do not have the mandated implementing regulations required under its terms.¹⁴⁴ In part this is because the Department of State resists incorporating unilateral environmental impact assessment into its foreign policy agenda.¹⁴⁵

¹⁴⁰ *Id.*

¹⁴¹ Letter from Patsy T. Mink, Assistant Secretary of State to Mr. Kieth Schreiner, Associate Director, FWS, April 28, 1978.

¹⁴² Letter from Robert S. Cook, Deputy Director, FWS, to John J. Gilligan, Department of State, July 27, 1978 (discussing applicability of section 7 to the Mahaweli Ganga Development Project, Sri Lanka).

¹⁴³ *Id.*

¹⁴⁴ See N. Robinson, *Environmental Impact Assessment Abroad* 17 (September 22, 1989) (unpublished manuscript available from the Pace University School of Law).

¹⁴⁵ *Id.* One assessment of the United States' environmental foreign policy posits

Clear support from the Executive branch would foster compliance with the general language of the environmental statutes imposing liability on federal agencies for their actions in foreign countries. Inertia can continue so long as a policy that supports, motivates or directs compliance is lacking.

C. *International Law and Defenders II*

According to an emerging body of general international principles, the United States is under a duty to protect biological diversity worldwide.¹⁴⁶ In the "Findings" section of the Endangered Species Act, the United States imposes a duty upon itself, as a nation in the international neighborhood, to conserve

that:

Since 1969, the content of U.S. environmental foreign policy has been modest and imprecise. Where treaties create express obligations, as in the Convention on the International Trade in Endangered Species [citation omitted], the policy can be clear. . . . For most foreign policy questions, however, environmental protection has been subject to countervailing tendencies, and the inertia of past policies in the State Department and other foreign affairs agencies has tended to restrict advancing new environmental protection positions [citations omitted]. Most of these past policies were framed with scant attention to trends in environmental degradation.

Id. at 17.

¹⁴⁶ Principle 2 of the 1973 Declaration of the United Nations Conference of the Human Environment provides: "[t]he natural resources of the earth, including the . . . flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate." Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14/Rev. 1 (U.N. Pub. E.73.II.A.14) (1973), reprinted in 11 I.L.M. 1416 (1973). Principle 21 further declares:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Id.

These principles on behalf of biological diversity are taken a step further in the 1982 United Nations World Charter for Nature. This Charter begins by setting out general principles, the second of which relates to the conservation of biological diversity: "the genetic viability on the earth shall not be compromised; the population levels of all life forms . . . must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded." In section III, the Charter goes beyond the statement of international principles and provides for implementation and action: "[t]he principles set forth in the present Charter shall be reflected in the law and practice of each State. . . ." *UN World Charter for Nature*, G.A. Res. 37/7, GAOR Supp. (no.51) at 17 (1982).

species that are threatened with extinction.¹⁴⁷ The Eighth Circuit, in ordering the reinstatement of extraterritorial scope for section 7, implements the international agreements to which the United States has pledged its support.

In addition to responding to the emerging body of international law on the preservation of biological diversity, federal provisions that apply to United States foreign countries are more easily enforced than international environmental legal provisions. First, using federal statutes as one means of addressing foreign or transnational conservation mechanisms permits litigation in the United States court system. Judgments for relief are obtainable in the federal courts and are binding and enforceable against United States agencies. Second, those federal statutes that contain citizen suit provisions eliminate the need to wait for governmental intervention and minimize the standing requirements that must be met before relief can be sought.¹⁴⁸

In contrast, the enforcement of international legal mechanisms is necessarily slow-paced and less certain. Complainants must either pursue the process of establishing an international arbitral tribunal¹⁴⁹ or initiate proceedings in the International Court of Justice. Before either of these processes may proceed, however, the complainant's government must first choose to advocate the complainant's environmental cause.¹⁵⁰ Then, the foreign defendant country must agree to submit to the jurisdiction

¹⁴⁷ The ESA provides:

The United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

....

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; . . . and

....

(G) other international agreements.

16 U.S.C. § 1531(4) (1988).

¹⁴⁸ The ESA contains a citizen suit provision at 16 U.S.C. § 1540(g). NEPA does not have a citizen suit provision.

¹⁴⁹ See, e.g., *Trail Smelter Arbitration (US v Canada)*, 3 R.Int'l Arb. Awards 1905 (1941).

¹⁵⁰ See I. PAENSON, *MANUAL OF THE TERMINOLOGY OF PUBLIC INTERNATIONAL LAW* 572-89 (1983) (Chapter VIII sets forth the general procedures used in the judicial, quasi-judicial and nonjudicial resolution of international disputes.)

of the designated court or tribunal.¹⁵¹

In addition, securing the payment of international settlements or judgments by the prevailing government to the injured nationals is less certain than securing federal judgments. Moreover, political negotiation between sovereigns may not proceed swiftly enough to prevent further environmental injury. Difficulties in agreeing on international standards and even in merely exchanging data on damage and treatment costs further compound the capacity of the United States and a foreign sovereign to give timely attention to ongoing environmental harm caused by American projects.¹⁵² Consequently, when complainants are limited to international mechanisms for redressing transnational environmental harm, inaction becomes the rule and effective international legal mechanisms tend to be limited to those which are instituted to cope with catastrophe.¹⁵³

In addition to expediting legal action and the payment of settlements, federal statutes that affect the international community serve as examples to other countries. Other nations may develop similar domestic provisions that hold their nationals responsible for the transnational environmental degradation they cause.¹⁵⁴ As the number of countries with such statutes grows, consensus on well-defined issues of environmental protection and enforcement can develop and lead to treaties that codify a unified approach.¹⁵⁵

CONCLUSION

Defenders of Wildlife v. Lujan acknowledges and upholds

¹⁵¹ *Id.*

¹⁵² Boxer, *The American Environmental Law System: A Model for Transnational Action*, 1 BROOKLYN J INT'L L 18 at 21 (1975), (paraphrasing Bleicher, *An Overview of International Environmental Regulation*, 2 ECOLOGY. L.Q. 1, 31-51 (1951)).

¹⁵³ It has been noted that:

[t]he dangers of a slow, piecemeal approach is that it is likely to leave us, in the words of a United States Government memorandum, one convention behind the next major pollution disaster, not only because of the slow process of drafting and signing a large number of conventions, but because of the inevitable delays in ratification.

Id. at 21 (quoting Bleicher, *An Overview of International Environmental Regulation*, 2 ECOLOGY L.Q. 1, 31-51 (1951)).

¹⁵⁴ See N. Robinson, *Environmental Impact Assessment Abroad* 17 (September 22, 1989) (unpublished manuscript available from the Pace University School of Law).

¹⁵⁵ *Id.*

the broad mandate of the ESA as enacted by Congress. The Eighth Circuit honored Congress' express, all-inclusive language and thereby laid to rest an attempt to promote an agency's agenda over the spirit of its enabling legislation. The United States Supreme Court is reviewing this decision.

Unresolved issues remain. Although the Eighth Circuit decided in favor of extraterritorial application, this is primarily because of the all-inclusive language of section 7 and not because the other provisions of the ESA or its legislative or regulatory history leave no doubt. While the United States Supreme Court's decision will be binding, using the courts to decide, in effect, upon the United State's environmental foreign policy arguably pushes the judiciary beyond the task of statutory construction. Unless the United States articulates a consensual, rational environmental foreign policy that can be systematically applied, the courts will continue to run interference between the mandates of absolute statutory language and the impracticability of those mandates and/or the lack of subsequent Congressional and Executive support suffered by these mandates. Because such a policy is lacking, compliance with section 7 regarding United States agency actions in foreign countries remains all but nonexistent. Until the State Department embraces international environmental conservation as a priority tenet of United States foreign policy, the ESA and other environmental statutes will not have the legal teeth their language gives them, whether or not the courts uphold the broad statutory mandates. Without such a policy, in the case of section 7, the decimation of biological diversity caused by United States agency actions in foreign countries continues, ironically, along-side the imperative statutory language designed to reduce it.

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